IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

PREMIUM IOWA PORK, L.L.C.,

Plaintiff,

vs.

BANSS SCHLACTH- UND FOERDERTECHNIK, GMBH,

Defendant

No. C 06-4051-MWB

MEMORANDUM OPINION AND ORDER REGARDING DEFENDANT'S MOTION TO VACATE DEFAULT JUDGMENT PURSUANT TO FED. R. CIV. P. 55(c) AND 60(b)(4)

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Approximately three months ago, this court entered a default judgment for nearly $20 million against the defendant in this action on claims of fraudulent inducement to contract and promissory estoppel, arising from a dispute over a hog dehairing system that the defendant had sold to the plaintiff. The defendant, a foreign corporation, has now moved to set aside that default judgment on the grounds that the default judgment is void for insufficient service of process and, in the alternative, that the default judgment should be set aside, in the court's discretion, in light of the plaintiff's conduct in obtaining the default judgment and other providential considerations. The plaintiff has resisted the defendant's motion on all grounds, asserting that the default judgment should be allowed to stand.

I. INTRODUCTION

A. Background

In its March 24, 2007, ruling on the plaintiff's motion for default judgment, *see* docket no. 21, this court made extensive findings of fact concerning the underlying dispute between the parties, albeit based on the defendant's failure to appear and contest the plaintiff's allegations. To provide the background to the defendant's present motion to set aside the default judgment, the court will begin with a brief reiteration of the key findings of fact upon which the court ultimately based its default judgment, even though the defendant now disputes many of those findings. The court will also address some new pertinent allegations.

Plaintiff Premium Iowa Pork, L.L.C., (PIP) is a meat packer located in Hospers, Iowa, engaged in the business of slaughtering hogs. Hospers is in Sioux County in the Northern District of Iowa. Defendant Banss Schlacht- Und Foerdertechnik, GmbH, (Banss) is a German company that sells meat packing equipment in Iowa and elsewhere worldwide. In 2005, PIP and Banss entered into an agreement for PIP's purchase from Banss of a "batch dehairing" system to dehair hogs, which PIP hoped would increase the number of hogs PIP could process and, thus, the efficiency and profitability of its business. As the court understands the system from the record on default judgment, after the hogs are stunned and killed, they enter the Banss system. This system includes a scalding chamber that is approximately three feet wide and twelve feet tall. The chamber is filled with condensed steam. The hogs are in this chamber approximately seven minutes. The scalding process allows the hair follicles to be pulled right off the animal in a subsequent step in the process. After the hogs leave the scalding chamber, they enter the dehairing apparatus, which allows a maximum capacity of six hogs per dehairing batch. In this apparatus, hogs are tumbled around inside the apparatus with rubber paddles to remove the hair from the hog's skin. Then the hogs continue on in the process to be washed and cleaned.

The Banss system was supposed to be delivered in November 2005, and was supposed to involve little down time for installation. Suffice it to say, there were problems with timely delivery, installation, and operation of the system. PIP maintained, and its evidence at the default judgment hearing was sufficient for the court to find, that the system never processed the number of hogs that Banss had promised that it could process and, instead, failed to dehair hogs adequately or even destroyed the usefulness of all or parts of many of the hog carcasses that PIP attempted to process. These problems led to catastrophic and expensive down time for PIP. Despite numerous attempts, Banss technicians were unable to solve all of the problems with the operation of the original system. Indeed, the court found, based on the evidence presented, that the original system provided to PIP was a prototype, not a system in use elsewhere, as Banss had represented it to be.

PIP filed a complaint in this court on June 8, 2006, alleging the following: (1) that PIP was fraudulently induced to enter into the original agreement with Banss for the hog dehairing apparatus; (2) in the alternative, that Banss breached a subsequent oral agreement with PIP for the hog dehairing apparatus; and (3) again in the alternative, that PIP should be awarded damages under a theory of promissory estoppel.

PIP served the complaint on Manfred Schomber, a Banss employee, at the conclusion of a meeting that he had attended with PIP representatives on June 8, 2006, at the Iowa State Fair Grounds in Des Moines, Iowa. Banss never answered PIP's complaint. Indeed, Banss now asserts that Schomber, who was not fluent in English, gave the papers with which he had been served to another Banss employee present at the meeting, Hermann Briel, to take back to Germany. Briel avers that he gave the papers to a secretary who was more fluent in English than he was, but that she later placed them on his desk without comment, so he simply filed them in a drawer.[1]

On August 12, 2006, representatives of Banss and PIP met again to discuss continuing problems with the Banss system. By that time, Banss was apparently aware of this federal lawsuit, but Banss maintains that it only ever received notice of the lawsuit and various filings in it, including PIP's later motion for default judgment and the court's order for a hearing on the motion for default judgment, when the Clerk of Court sent copies to Banss. At the August 12, 2006, meeting, the parties entered into a settlement agreement pursuant to which PIP would give back the original system, and Banss would provide PIP with a different system, a Model 220-2, like one that was in use in Canadian factories. Banss agreed to pay for additions to the building at PIP's plant in Hospers, Iowa, to accommodate the new system and to provide a new parts package for the new system. Banss represented that the new system would process 300 to 400 head per hour. Banss further agreed to (1) "deliver Model 220-2 to PIP as soon as possible and in no event later than September 30, 2006;" (2) "warrant, represent, and guarantee that the Model 220-2 will process at least 200 white hogs per hour;" and (3) "provide and pay for any additional equipment related to the dehairing process necessary to achieve the 200 white hogs per hour guarantee and/or any additional equipment deemed necessary by an engineer." If Banss met the conditions of the August 12, 2006, agreement for six months, the parties agreed that PIP would dismiss the present lawsuit concerning problems with the original system.

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[1]In the pertinent part or parts of the court's legal analysis, the court will consider in more detail Schomber's employment or representative capacity with Banss and the circumstances under which PIP served its complaint upon Schomber.

On November 7, 2006, PIP's plant started running again, and Banss sent technicians to configure the new system. However, the new system still only produced between 150 to 170 head an hour. As of the date of the default judgment hearing in March 2007, the new Banss system had never reached the 200 head an hour minimum that Banss warranted.

To offset losses from this entire matter, the owner of PIP sold 20% of PIP's stock to another individual. This sale was an unplanned, emergency measure intended to provide the necessary operating capital to continue running the company. PIP also went forward with the present lawsuit, despite the parties' August 12, 2006, agreement, because PIP believed that Banss had failed to meet the conditions of that agreement. Indeed, PIP initiated a separate lawsuit in Iowa District Court for Sioux County for breach of the August 12, 2006, settlement agreement.

On January 31, 2007, PIP moved for default judgment against Banss in this federal lawsuit (docket no. 10),[2] but then backtracked to fulfill the procedural prerequisite of moving for entry of default against Banss on February 1, 2007 (docket no. 11). *See* FED. R. CIV. P. 55(a) (providing for entry of default) & (b) (providing for default judgment against a party against whom a default has been entered); *DIRECTV, Inc. v. Meyers*, 214 F.R.D. 504, 510 (N.D. Iowa 2003) ("[A]s this court has explained, Rule 55 "requires two steps before entry of a default judgment: first, pursuant to FED. R. CIV. P. 55(a), the party seeking a default judgment must have the clerk enter the default by submitting the required proof that the opposing party has failed to plead or otherwise defend; second, pursuant to FED. R. CIV. P. 55(b), the moving party may seek entry of judgment on the default under either subdivision (b)(1) or (b)(2) of the rule.'") (quoting *Hayek v. Big Brothers/Big Sisters of America*, 198 F.R.D. 518 (N.D. Iowa 2001), in turn quoting *Dahl v. Kanawha Inv. Holding Co.*, 161 F.R.D. 673, 683 (N.D. Iowa 1995)). The clerk entered Banss's default on February 2, 2007 (docket no. 12), and the court set a hearing on PIP's motion for default judgment for March 15, 2007.

Although Banss admits that it was aware by March 2007 that the court had set the March 15, 2007, hearing on PIP's motion for default judgment, Banss now contends that it believed that PIP agreed during a March 5, 2007, meeting between representatives of

[2] On the same day that PIP moved for entry of default against Banss, it also moved to dismiss without prejudice all claims against another defendant, Hans Homburg, who had apparently been involved in the negotiation of the sale of the original dehairing system to PIP. *See* docket no. 9.

both parties to suspend this federal lawsuit, as well as the state court lawsuit, because the parties were continuing their attempt to work out the problems with the second Banss system. Banss contends that PIP specifically represented that Banss did not need to be concerned about the hearing on PIP's motion for default judgment in this lawsuit. PIP, on the other hand, maintains that any agreement to extend deadlines or to respond to allegations related only to the state court lawsuit and that there was never any agreement to suspend or delay proceedings in this federal lawsuit.

PIP appeared for the default judgment hearing on March 15, 2007, but Banss did not. After the hearing, at which PIP presented evidence to support its claims, the court entered a Memorandum Opinion And Order (docket no. 21) on March 24, 2007, in which the court found that PIP had proved all of the elements of its fraudulent inducement claim. More specifically, the court found that Banss had knowingly made the following three material statements, which were false, to induce PIP to purchase a dehairing system from Banss, and that PIP had relied on these statements to its detriment: (1) that the original system would create an output of 120 to 150 hogs per hour, a representation found in both its system drawings and in the energy and consumption data; (2) that the original system that PIP purchased was currently operational in two plants in Canada, when it was actually a prototype not in operation anywhere; and (3) that the original system PIP purchased was operational in other countries besides Canada, when it was actually a prototype not in use anywhere.

Using conservative calculations by PIP's witnesses at the default judgment hearing, this court found PIP incurred $1,755,936.36 in damages from Banss's delay in delivering its original equipment from November 14, 2005, to February 17, 2006; that PIP further suffered lost profits in the amount of $2,665,244.55 from the shut down in the plant for 90 business days; and that PIP also had damages of $447,301.40 from operating overtime to offset the lost output. Thus, the court found that the total of PIP's actual damages was $4,868,482.31. The court also awarded punitive damages in the amount of $14,605,446.93 on PIP's fraudulent inducement claim. In the alternative, the court found that PIP had proved the elements of its promissory estoppel claim and awarded actual damages on that claim in the amount of $4,868,482.31. Judgment (docket no. 22) was entered accordingly on March 27, 2007.

B. The Motion To Set Aside The Default Judgment

By May 2007, Banss had retained American counsel in relation to this matter. The court held a telephonic conference on May 29, 2007, at which attorneys for both Banss and PIP appeared, after the court was apprised of Banss's request for documents related to this lawsuit.[3] At the conference, with the agreement of PIP's counsel, the court granted Banss access to the transcript of the default judgment hearing and the order on default judgment.

By order (docket no. 29) dated June 22, 2007, the court granted Banss leave to file under seal its anticipated motion to vacate default judgment. Banss filed its actual Motion To Vacate Default Judgment Pursuant To Fed. R. Civ. P. 55(c) And 60(b)(4) (Motion To Vacate) (docket no. 33) on June 26, 2007, then refiled the motion and accompanying brief under seal on June 27, 2007 (docket nos. 35 & 36). After an extension of time to do so, PIP filed its Resistance To Defendant's Motion To Vacate Default Judgment (docket no. 41) on July 27, 2007. Similarly, after an extension of time to do so, Banss filed a Reply (docket no. 45) on August 13, 2007. On August 21, 2007, PIP sought leave to file a surreply to address "new" arguments and allegations in Banss's Reply. *See* docket no. 48.

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[3]The court and the parties agreed that the appearance of Banss's attorneys at this conference did not waive any challenges to the court's jurisdiction over Banss.

The court granted that motion on August 21, 2007, *see* docket no. 48, and PIP's Surreply (docket no. 49) was filed on August 23, 2007.

Banss requested oral arguments on its Motion To Vacate in its original motion. However, the court has found such oral arguments unnecessary in this case, owing to the completeness of the parties' briefing and evidentiary submissions.

II. LEGAL ANALYSIS

As the court explained at the outset of this decision, Banss contends that the default judgment is void owing to insufficient service of process and, in the alternative, that the default judgment should be set aside, in the court's discretion, in light of PIP's conduct in obtaining the default judgment and other providential considerations. The court will consider these arguments in turn, at least to the extent necessary to resolve Banss's Motion To Vacate. In doing so, the court will make further findings of fact as necessary from the parties' submissions in support of and opposition to Banss's Motion To Vacate.

A. Insufficient Service

Banss's initial argument for relief from the default judgment against it in this case is that the default judgment is void, because it was entered without effective service of process on Banss. Rule 60(b)(4) of the Federal Rules of Civil Procedure "authorizes the district court to grant relief from void judgments" and "relief from void judgments is not discretionary." *Chambers v. Armontrout*, 16 F.3d 257, 260 (8th Cir. 1994). More specifically, "[i]f a defendant is improperly served, a federal court lacks jurisdiction over the defendant," and a default judgment obtained in the absence of personal jurisdiction is void and must be vacated. *Printed Media Servs., Inc. v. Solna Web, Inc.*, 11 F.3d 838, 843 (8th Cir. 1993). The Eighth Circuit Court of Appeals has rejected the argument, also offered by PIP here, that a party is estopped to assert insufficiency of service if it received actual notice of the lawsuit. *Id.* Thus, if service of process in this case was insufficient, the court need not consider Banss's arguments that the court should vacate the default judgment as a matter of discretion, and the court must, instead, simply vacate the default judgment as void.

1. Arguments of the parties

a. Banss's initial argument

In support of its contention that it was never properly served with PIP's complaint in this federal lawsuit, Banss asserts that Rule 4 of the Federal Rules of Civil Procedure did not authorize PIP to effect service on Banss by serving Manfred Schomber, because Schomber is not an agent for service of process on Banss, nor is he an officer, managing agent, or general agent under either Rule 4(h) or German law. Rather, Banss contends that Schomber was the head of installation for Banss, a position that gave him no authority to accept service on behalf of Banss. Banss argues that nothing in the certificate of service that PIP filed with the court suggests the nature or source of any legal authority allowing Schomber to receive service for Banss. Indeed, Banss contends that it would have been easy for PIP to determine that Schomber lacked the required capacity and to determine who in Banss's corporate structure did have that capacity by examining Banss's website, which displays the pertinent information about corporate structure and agents, as required by German law. Banss also notes that questions about the sufficiency of service in this case could have been avoided, had PIP served Banss pursuant to The Hague Convention on the Service Abroad of Judicial and Extrajudical Documents in Civil or Commercial Matters (the Hague Convention). Because service upon Schomber was not effective, Banss argues that the court could not exercise personal jurisdiction over Banss. Consequently, Banss argues that the default judgment is void, and must be vacated pursuant to Rule 60(b)(4) of the Federal Rules of Civil Procedure.

b. PIP's response

In its response, PIP argues that The Hague Convention is irrelevant, because PIP served Banss *in* the United States, not *outside* the United States. PIP also contends that service upon Schomber was effective under Rule 4(h)(1) of the Federal Rules of Civil Procedure, which governs service within the United States, because that Rule allows, as one alternative, service in accordance with the laws of the state in which the district court is located or service is effected. PIP argues that both Iowa Rules of Civil Procedure 1.305(6) and 1.305(12) and IOWA CODE § 617.3 allow service upon a "general agent" of the defendant and that, under applicable state law, Schomber was a "general agent" of Banss at the time he was served. Specifically, PIP contends that Schomber could accept service after the June 8, 2006, meeting in Des Moines, Iowa, because there was no one person present in the state actually authorized to receive service on behalf of Banss, and Schomber was not merely the head of installation for Banss, but an "owner" of the company. PIP contends that it was unaware of the internal hierarchy of Banss at the time that Schomber was served, but that PIP's president, Barton Bickley, had demanded to speak with a person with authority regarding the continuing problems with the Banss system, and Banss put forward Schomber for the meeting in Des Moines, Iowa, and for a visit to PIP's plant in Hospers, Iowa. PIP maintains that, during his visit to Iowa, Schomber was in charge of dealings with PIP about the pertinent problems with the equipment, had other employees working for him, and was described by those employees as "the boss." Indeed, PIP argues that Schomber was even authorized to make settlement offers at the June 8, 2006, meeting.

Even if Schomber was not a "general agent" of Banss, PIP contends that Schomber was properly served under IOWA CODE § 617.3, because he was a person "transacting the business" of Banss at the time that he was served. Schomber's transaction of business, PIP argues, included, but was not limited to, participating in settlement negotiations.

PIP also argues that Schomber was properly served under a second alternative under Rule 4(h)(1), because he was a "general agent" under federal law. PIP argues that service was good if the person who received service was of sufficient rank and character to receive it, so that service was reasonably calculated to provide notice, even if the person served did not have actual authority to receive service, and even if the company did not receive actual notice of the lawsuit. Here, PIP argues that Schomber made a point of giving the papers with which he had been served to Briel, who was a Prokurist for Banss under German law, which PIP argues means that Briel had at least some authority under German law to represent Banss in legal proceedings. Thus, PIP argues that service upon Schomber provided Banss with a reasonable opportunity to be apprised of the lawsuit. PIP contends that Briel's failure to act reasonably after Schomber gave him the papers, because Briel simply stuck the papers in a drawer, does not invalidate service.

c. Banss's reply

In reply, Banss argues that PIP ignored straightforward methods of service, including service under The Hague Convention, in favor of an obscure method of service under Iowa law that was replete with problems of proof. Banss contends that PIP's selection of the method of service and failure to provide Banss with copies of any motions filed in this case, despite numerous contacts with Banss's management over the year following filing of the case does not measure up to the standards of a party taking seriously its burden to effect and prove service of process.

Turning more specifically to the sufficiency of service upon Schomber, Banns argues that Schomber was not a general agent under Rule 4, because Schomber had no broad or extensive responsibilities at Banss to act on the company's behalf; rather, he was the head of installation, a technical role isolated from administrative or management responsibilities. Moreover, Banss contends that Schomber's limited authority, if any, to act on Banss's behalf concerning the problems with PIP's dehairing system was not sufficient to make him an agent of the company authorized to receive service of process. Banss points out that Schomber had no familiarity with the formalities associated with receiving service of process and, indeed, no idea what the papers with which he had been served were or what to do with them. Banss also argues that Schomber was not authorized to receive service under Iowa law, because he was neither an agent of Banss nor transacting the business of Banss. Banss also points out that Schomber was not an "owner" of Banss, but a "shareholder," and his "shareholder" status did not confer any agency or management authority upon him. Banss also disputes that Schomber made any settlement offer to PIP, but that even assuming that he made such an offer, he had no authority from Banss to make such an offer, and such an isolated exercise of authority is not sufficient to make him Banss's general agent.

Banss also argues that Schomber was not authorized to receive service under IOWA CODE § 617.3, because he was not "transacting the business" of Banss, where his interaction with PIP never resulted in conclusion of any transaction. Rather, Banss contends that Schomber merely assisted a customer with a problem. Banss also points out that Schomber was not "transacting the business" of Banss in the county where the action was brought, but in a different county, and indeed, a different federal judicial district, when he was served. Finally, Banss asserts that, if Schomber could be construed to have been "transacting business," then there was another such person "transacting business" of

Banss in the appropriate county and federal judicial district, Andreas Bernhardt, but PIP did not attempt to serve him or attempt to serve Banss by serving the Iowa Secretary of State.[4]

2. Sufficiency of service upon Banss

a. Service of process upon a foreign corporation

Rule 4 of the Federal Rules of Civil Procedure provides, in pertinent part, for service of process upon a foreign corporation as follows:

> **(h) Service Upon Corporations and Associations.** Unless otherwise provided by federal law, *service upon a* domestic or *foreign corporation* or upon a partnership or other unincorporated association that is subject to suit under a common name, and from which a waiver of service has not been obtained and filed, *shall be effected*:
>
> **(1)** *in a judicial district of the United States* in the manner prescribed for individuals by subdivision (e)(1), *or* by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant, or
>
> **(2)** *in a place not within any judicial district of the United States* in a manner prescribed for individuals by subdivision (f) except personal delivery as provided in paragraph (2)(C)(i) thereof.

FED. R. CIV. P. 4(h) (emphasis added). Because service was attempted *in a judicial district of the United States* in this case, only subdivision (h)(1) is relevant here.

[4] Although PIP filed a surreply (docket no. 48) concerning Banss's Motion To Vacate, the court does not find any of the arguments therein to be pertinent to the question of whether service of process upon Schomber was sufficient to effect service upon Banss.

Subdivision (h)(1) provides two alternatives for effecting service upon a foreign corporation: (1) service "in the manner prescribed for individuals by subdivision (e)(1)"; and (2) service upon "an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process." FED. R. CIV. P. 4(h)(1). The court will consider the sufficiency of service upon Banss under each of these alternatives in turn.

b. Service "in the manner prescribed for individuals"

The first alternative for service on a foreign corporation in a judicial district of the United States under Rule 4(h)(1) is "in the manner prescribed for individuals by subdivision (e)(1)." FED. R. CIV. P. 4(h)(1). Rule 4(e)(1), in turn, provides as follows:

> **(e) Service Upon Individuals Within a Judicial District of the United States.** Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in any judicial district of the United States:
>
> **(1)** *pursuant to the law of the state in which the district court is located*, or in which service is effected, for the service of a summons upon the defendant in an action brought in the courts of general jurisdiction of the State[.]

FED. R. CIV. P. 4(e)(1) (emphasis added). Thus, the question for this alternative is how service can be effected pursuant to the law of the State of Iowa.

i. Service pursuant to Iowa law. The parties have identified two provisions of Iowa law pertaining to service of process in this case. First, Rule 1.305 of the Iowa Rules of Civil Procedure provides, in pertinent part, as follows:

> Original notices are "served" by delivering a copy to the proper person. Personal service may be made as follows:

> * * *
>
> **1.305(6)** Upon a partnership, or an association suable under a common name, or a corporation, by serving any present or acting or last known officer thereof, or any general or managing agent, or any agent or person now authorized by appointment or by law to receive service of original notice, or on the general partner of a partnership.
>
> * * *
>
> **1.305(12)** Upon any individual, corporation, partnership or association suable under a common name, either as provided in these rules, as provided by any consent to service or in accordance with any applicable statute.

IOWA R. CIV. P. 1.305(6) (formerly Rule 56.1(f)) & (12).

Second, because Rule 1.305(12) permits service "in accordance with any applicable statute," the parties assert that IOWA CODE § 617.3 is also relevant. That statute provides, in pertinent part, as follows:

> If the action is against any corporation or person owning or operating any railway or canal, steamboat or other rivercraft, or any telegraph, telephone, stage, coach, or carline, or against any express company, or against any foreign corporation, service may be made upon any general agent of such corporation, company, or person, wherever found, or upon any station, ticket, or other agent, or person transacting the business thereof or selling tickets therefor in the county where the action is brought; if there is no such agent in said county, then service may be had upon any such agent or person transacting said business in any other county.

IOWA CODE § 617.3.

The court will consider, in turn, the sufficiency of service upon Banss pursuant to Rule 4(e)(1) under the Iowa rule and the Iowa statute.

ii. Service pursuant to Rule 1.305(6). PIP apparently does not contend that Schomber was an officer of Banss at the time he was served with PIP's federal complaint against Banss, but PIP does contend that he was a "general or managing agent." IOWA R. CIV. P. 1.305(6) (permitting service upon "any general or managing agent," as well as an "officer"). Thus, the question for sufficiency of service under Rule 1.305(6) is whether Schomber was the necessary kind of "agent."

The Iowa Supreme Court has held that a "managing agent" must be "a person whose position with the corporation 'is one of sufficient character and rank to make it reasonably certain that the corporation will be apprised of the service made through the agent.'" *Gutierrez v. Wal-Mart Stores, Inc.*, 638 N.W.2d 702, 706 (Iowa 2002) (quoting *Life v. Best Refrigerated Express, Inc.*, 443 N.W.2d 334, 337 (Iowa Ct. App. 1989), both construing the identical language of former Rule 56.1(f)). The Iowa Court of Appeals has defined a "general agent" under the rule as follows: "It has been said that 'a general agent is one who is clothed with general authority to act for his principal. . . . A general agent is one who is authorized to transact all the business of his principal, at a particular place or *of a particular kind, generally*.'" *Life*, 443 N.W.2d at 337 (quoting *Johnson v. Aeroil Products Co.,* 124 N.W.2d 425, 427 (Iowa 1963), with emphasis added by the court in *Life*). The court must apply these definitions "to facts gleaned from testimony in th[e] record," and a reviewing court will not overturn a trial court's jurisdictional fact-findings "unless they are unsupported by substantial evidence." *Gutierrez*, 638 N.W.2d at 706; *Life*, 443 N.W.2d at 336-37; *Newton Mfg. Co. v. Biogenetics, Ltd.*, 461 N.W.2d 472, 474 (Iowa Ct. App. 1990). However, where the party challenging service provided only a conclusory statement that the person served was not a general or managing agent, but no evidence to support that conclusion, the Iowa Court of Appeals held that the trial court properly found the requisite agency. *Life*, 443 N.W.2d at 337.

Banss has not simply relied on conclusory statements that Schomber lacked the requisite agency, but has, instead, pointed to supporting evidence showing that Schomber's duties were restricted to working as the head of installation, which did not include general administrative or managerial duties on behalf of Banss. *Compare id.* Schomber's circumstances are plainly different from those identified in *Gutierrez* as sufficient to demonstrate that the person served was a "managing agent" for purposes of the rule. *See Gutierrez*, 638 N.W.2d at 706. In *Gutierrez*, the Iowa Supreme Court concluded that "the evidence of the scope" of the purported agent's duties, as an assistant store manager, were such that "a reasonable factfinder could infer that [the purported agent's] management position with [the defendant] was of sufficient 'character and rank' to expect that he would place the service of notice in the right corporate hands," and that "[h]e obviously did." *Gutierrez*, 638 N.W.2d at 706. Specifically, the court noted that the person served, an assistant manager, performed similar functions as several other assistant or co-managers, which included "'to walk in the shadow of the store manager's shoes . . . just learn what he's doing and basically do his job.'" *Id.* (quoting testimony of another co-manager). The court also noted that the defendant's "vigorous and timely defense of the lawsuit suggest[ed] it was promptly notified of the service of process." *Id.* Here, however, there is no evidence that Schomber was ever required to do the job of the sole managing director of Banss, Mr. Wolfram Fröhlich, Schomber plainly did not know what the papers with which he had been served were or what to do with them, and the record demonstrating the lack of any timely defense to the federal complaint by Banss strongly suggests that Banss was not promptly notified of the service of process. *Compare id.* In short, Schomber's position as head of installation and his activities in this case do not demonstrate that his position was of sufficient "character and rank" to expect that he would place the service of notice in the right corporate hands, and he obviously did not. *Compare id.* Thus, the court concludes that Schomber was not a "managing agent" within the meaning of the rule.

Nor was Schomber a "general agent" of Banss who could accept service on Banss's behalf. Contrary to PIP's contentions, Schomber was not "'clothed with general authority to act for his principal'"; indeed, he was not "'authorized to transact all the business of [Banss], at a particular place or *of a particular kind, generally*.'" *Life*, 443 N.W.2d at 337 (quoting *Johnson*, 124 N.W.2d at 427, with emphasis added by the court in *Life*). While PIP makes much of evidence that its president, Mr. Bickley, demanded to speak to someone with authority to resolve PIP's problems with the Banss system, and Banss purportedly put forward Schomber, the record shows that Schomber was not authorized to transact all of Banss's business *in the United States*, or any particular market, for example, and certainly was not authorized to transact all of the business of Banss *of a particular kind, generally,* such as negotiating all sales in the United States market, even if he was authorized to try to troubleshoot the problems with the Banss's system in the PIP plant.

Nor is Schomber's authority comparable to that of the purported "general agent" in *Newton Mfg. Co. v. Biogenetics, Ltd.*, 461 N.W.2d 472 (Iowa Ct. App. 1990). In *Newton Mfg. Co.*, the Iowa Court of Appeals held that the defendant had been properly served through a purported "general agent," because the purported agent had been held out as one with whom the plaintiff could deal, she had in fact accepted service on the defendant's behalf many times, and the defendant failed to refute the evidence tending to show that she was a general agent. *Newton Mfg. Co.*, 461 N.W.2d at 474. Here, however, even assuming that Schomber had been held out as one with whom PIP could deal in trying to resolve problems with the dehairing system, there is no evidence that Schomber was put forward as anything other than a *technical* expert who could resolve *technical* problems, there is no evidence that Schomber had ever before accepted service on Banss's behalf and, as pointed out above, Banss has offered evidence showing Schomber's limited authority, which refutes PIP's evidence, which at best only weakly suggested that Schomber was some kind of "general agent" of Banss. *Compare Newton Mfg. Co.*, 461 N.W.2d at 474 (holding that the defendant had been properly served through a purported "general" agent, because the purported agent had been held out as one with whom the plaintiff could deal, she had in fact accepted service on the defendant's behalf many times, and the defendant failed to refute the evidence tending to show that she was a general agent).

In other contexts, Iowa courts have recognized that an employee is not always an agent of the employer, because an agent usually has greater authority to act for the principal, such as negotiating contracts, while an employee typically renders services at the direction of the employer. *See, e.g., Condon Auto Sales & Service, Inc. v. Crick*, 604 N.W.2d 587, 599 (Iowa 1999). Here, the record as enhanced with Banss's evidence shows that, even as head of installation, Schomber did no more than render services at the direction of Banss in trying to fix the problems with PIP's dehairing system and, thus, acted as an employee, not an agent. Nor did Schomber's purported attempt to negotiate a settlement during the June 8, 2006, meeting, after which he was served, make him a "general agent" for purposes of the rule. *See id.* (an agent has authority to act for the principal, such as negotiating contracts). Schomber and Banss dispute that Schomber ever made any settlement offer, Banss denies that Schomber was authorized to make any settlement offers, and no settlement agreement came out of the June 8, 2006, meeting.

Finally, Schomber's purported status as an "owner" of Banss did not confer any managing or general agency authority upon him. The court finds from Banss's evidence that Schomber's "ownership" consisted only of shareholder status; PIP has not pointed to any evidence that Schomber owned enough shares of Banss to give him any control of the company or to give him any managerial or agency authority.

In short, Banss was not effectively served pursuant to Iowa Rule of Civil Procedure 1.305(6).

iii. Service pursuant to IOWA CODE § 617.3. In the alternative, PIP argues that Banss was properly served by serving Schomber pursuant to IOWA CODE § 617.3, an applicable statute within the meaning of Iowa Rule of Civil Procedure 1.305(12). Although Banss complains that this provision is "obscure," and primarily intended for service on communications businesses or common carriers, the Iowa Supreme Court long ago held that this provision pertains to any foreign corporation and is not limited to businesses related to communications or transportation. *See Johnson*, 124 N.W.2d at 426-27 (citing *Kalbach v. Service Station Equip. Co.*, 224 N.W. 73, 75 (Iowa 1929), as so holding). Thus, the question is whether service upon Schomber satisfied any of the provisions of the statute.

The statute identifies three categories of persons who may be served with process upon a foreign corporation: (1) "any general agent of such corporation, . . . wherever found"; (2) "any . . . other agent, or person transacting the business thereof . . . in the county where the action is brought"; and (3) "if there is no such agent in said county, then . . . any such agent or person transacting said business in any other county." *See Johnson*, 124 N.W.2d at 426 (identifying these portions of the statute by italicizing pertinent language). The court concluded above, and reiterates here, that Schomber was not a "general agent" of Banss, so that he does not fall within the first category of persons upon whom service may be effected pursuant to IOWA CODE § 617.3. Schomber also was not served "in the county where the action is brought"—indeed, he was not even served in the *federal judicial district* where the action is brought—even if he was a "person transacting the business" of Banss when he was served after the June 8, 2006, meeting in Des Moines, Iowa. Hospers, Iowa, and Des Moines, Iowa, are not in the same county, and Hospers is in the *Northern* District of Iowa, where this action has been brought, while Des Moines is in the *Southern* District of Iowa. Thus, Schomber did not fall within the second category of persons upon whom service may be effected pursuant to IOWA CODE § 617.3. Consequently, the sufficiency of service under the statute hinges upon whether Schomber falls within the third category of persons identified therein.

PIP asserts, with absolutely no supporting evidence, that there was no other "agent" of Banss in the county (or federal judicial district) in which its federal action was brought at the time that PIP served Schomber, and argues that Schomber was "transacting business" of Banss, for example, by making settlement proposals at the June 8, 2006, meeting. In contrast, Banss contends that Schomber was not "transacting business," because Banss denies that Schomber made any settlement offer and contends that, at most, PIP's evidence suggests that Schomber proposed a settlement, but no "transaction" was ever completed. Banss also argues that there were agents upon whom service could have been effected in the county (or federal judicial district) in which this action was brought, because PIP could have served either Banss representative Andreas Bernhardt, who was actually at the plant in Hospers, Iowa, in the Northern District of Iowa, or the Iowa Secretary of State. Banss contends that, if Schomber was "transacting business" of Banss at the June 8, 2006, meeting in Des Moines, then Andreas Bernhardt was also "transacting business" of Banss at the plant in Hospers at the time, because he was offering the same kind of assistance and having the same kinds of discussions as Schomber.

There is little Iowa case law providing any indication of what constitutes a person "transacting business" of the corporation within the meaning of § 617.3. In *Johnson v. Aeroil Prods. Co.*, 124 N.W.2d 425 (Iowa 1963), the Iowa Supreme Court held that the trial court "might well find" that the person served was at least the defendant's general agent and transacting its business, where the person had been designated the defendant's "regional manager," had been sent to a convention as the defendant's representative, had been permitted to demonstrate and sell its products in its booth, and had been allowed to hand out cards and state orally that he was the defendant's regional manager. *Johnson*, 124 N.W.2d at 936. On the other hand, in *De Claire Mink Ranches v. Federal Foods, Inc.*, 192 F. Supp. 148 (D. Iowa 1961), the court held that a delivery truck driver, who did not engage in selling and was not a qualified consultant as to the use of defendant's products, but only made deliveries, helped customers unload their orders, obtained the customer's signature on a delivery receipt, and only occasionally made collections on delinquent accounts, which payments he then remitted in kind directly to the home office, *see De Claire Mink Ranches*, 192 F. Supp. at 150, was not "transacting business" of the defendant company. *Id.* at 154. Broadly speaking, the difference in these cases between a person who was "transacting business" of the foreign corporation and a person who was merely acting as an employee appears to be between a person who was held out as able to complete sales of the defendant's products or to enter into contracts binding the corporation, as in *Johnson*, and a person who was merely servicing the defendant's customers, as in *De Claire Mink Ranches*. *See generally Condon Auto Sales & Service, Inc.*, 604 N.W.2d at 599 (an employee is not always an agent of the employer, because an agent usually has greater authority to act for the principal, such as negotiating contracts, while an employee typically renders services at the direction of the employer). That being so, Schomber plainly falls into the latter category, because he was held out by Banss as the person who could service Banss's customers by fixing the technical problems with the dehairing system, but was not held out as one who could, and he did not in fact have the authority to, enter into any transaction for the sale of Banss's products or as one who could enter into any contract binding upon Banss.

Even supposing, however, that Schomber's activities at the meeting in Des Moines constituted "transacting business" of Banss, Banss has pointed out that Andreas Bernhardt was engaged in similar activity *in the county (and federal judicial district) in which PIP's action was brought*. Thus, Schomber does not fit the third category of persons who can be served with process on behalf of a foreign corporation, because PIP cannot satisfy the condition that there was "no such agent in said county," that is, no person in category two in the county where the action is brought. *See Johnson*, 124 N.W.2d at 426 (identifying the categories of persons who can be served pursuant to § 617.3).

Thus, Schomber was not properly served under Iowa law, and as such, Banss was not properly served under the first alternative under Rule 4(h)(1) of the Federal Rules of Civil Procedure.

c. Service upon "a managing or general agent"

As explained above, the second alternative for effecting service upon a foreign corporation pursuant to Rule 4(h)(1) of the Federal Rules of Civil Procedure is to deliver the complaint and summons to "an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process." FED. R. CIV. P. 4(h)(1). There is no argument that Schomber was authorized by appointment or by law to receive service of process, nor is there any evidence that he was an officer of Banss. Thus, the question under this alternative for this case becomes, again, whether Schomber was a "managing or general agent" of Banss under the *federal* rule.[5]

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[5]PIP also argues that service must only be "reasonably calculated," under the circumstances, to apprise the defendant of the pendency of the action, even if it fails to (continued...)

The Eighth Circuit Court of Appeals has held that a salesman was not a "managing agent" where he was "'not vested with discretion in establishing prices, terms, or conditions of contracts or orders and any contracts entered into or orders taken [were] subject to company approval outside the state.'" *Dodco, Inc. v. American Bonding Co.*, 7 F.3d 1387, 1388 (8th Cir. 1993) (construing former Rule 4(d)(3), which was identical to present Rule 4(h)(1)). Similarly, in *Jennings v. McCall Corp.*, 320 F.2d 64 (8th Cir. 1963), the Eighth Circuit Court of Appeals concluded that the trial court was justified in concluding that a sales representative was not a managing or general agent, where the sales representative attempted to secure new retail accounts and called on existing accounts to suggest ways to improve sales, but was not vested with discretion in establishing prices, terms, or conditions of contracts or orders, and any contracts entered into or orders taken were subject to company approval outside the state. *See Jennings*, 320 F.2d at 66 & 72 (also construing former Rule 4(d)(3)). PIP has presented no evidence that Schomber had any discretion to establish prices, terms, or conditions of contracts or orders. Even supposing that he proposed a settlement agreement during the June 8, 2006, meeting, which Schomber and Banss deny, Banss has produced evidence that Schomber did not have

[5](...continued)
provide the defendant with actual notice, citing, *inter alia*, *LSJ Investment Co., Inc. v. O.L.D., Inc.*, 167 F.3d 320, 323 (6th Cir. 1999). As Banss points out, however, the court in *LSJ Investment Company* actually held that "[f]or service to be proper, *it must not only comply with the relevant rule*, but must comport with due process by providing 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *LSJ Inv. Co., Inc.*, 167 F.3d at 323 (quoting *Whisman v. Robbins*, 712 F. Supp. 632, 638 (S.D. Ohio 1988), in turn quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). Thus, service must *both* comply with the applicable rule *and* meet the due process minimum. The question in this case is whether the requirements of the applicable rule were met.

authority to enter into any such agreement on Banss's behalf and no such contract actually resulted from the meeting. Again, the court finds that Schomber was held out as a person who could solve *technical* problems with the dehairing system, not as one who could act on Banss's behalf more generally in any transaction of its business. Therefore, the court concludes that Schomber was not a "managing or general agent" of Banss upon whom service could be effected pursuant to the second alternative in Rule 4(h)(1).

3. Summary

PIP has failed to show that Schomber was a person through whom Banss could be served, either pursuant to the applicable Iowa rules and statute or pursuant to the applicable federal rule. Because Banss was improperly served, this federal court lacks jurisdiction over Banss, and the default judgment obtained in the absence of personal jurisdiction is void and must be vacated. *Printed Media Servs., Inc.*, 11 F.3d at 843; *see also Chambers*, 16 F.3d at 260 (Rule 60(b)(4) of the Federal Rules of Civil Procedure "authorizes the district court to grant relief from void judgments" and "relief from void judgments is not discretionary.").

B. Discretion

Banss argues, in the alternative, that the default judgment should be set aside, in the court's discretion, in light of PIP's conduct in obtaining the default judgment and other providential considerations. Rule 55(c) of the Federal Rules of Civil Procedure provides that the court *may* set aside a default judgment "in accordance with Rule 60(b)." FED. R. CIV. P. 55(c) (the court may set aside an entry of default "and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)). Rule 60(b), in turn, provides that "the court *may* relieve a party or a party's legal representative from a final judgment, order, or proceeding," *inter alia*, for "fraud . . ., misrepresentation, or other misconduct of an adverse party" or "any other reason justifying relief from the operation of the judgment." *See* FED. R. CIV. P. 60(b)(3) & (6) (emphasis added). However, because the court has found that the default judgment is void, for insufficient service, and the court *must* grant relief from a void judgment, *see Chambers*, 16 F.3d at 260, the court finds it unnecessary to consider the parties' arguments concerning whether or not the court should set aside the default judgment on discretionary grounds.

C. Certification For Interlocutory Appeal

Although neither party requested such a determination, the court deems it appropriate to consider *sua sponte* whether this order granting Banss's motion to set aside the default judgment entered against it should be certified for interlocutory appeal. "Generally, only a final order may be appealed[, but] [s]ection 1292(b) [of Title 28 of the United States Code] creates an exception to this rule." *Chelette v. Harris*, 229 F.3d 684, 686 (8th Cir. 2000). The pertinent statute provides for interlocutory appeal as follows:

> (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. § 1292(b) (emphasis in the original). As the Eighth Circuit Court of Appeals has observed, the statute provides for certification of controlling questions of law by the district court for interlocutory appeal in circumstances where an appeal is otherwise unavailable. *City of Fort Madison, Iowa v. Emerald Lady*, 990 F.2d 1086, 1088 n. 4 (8th Cir. 1993). However, the appellate court must, upon certification, decide, in its discretion, whether to permit the appeal on the question certified. *Id.*[6]

In *Moland v. Bil-Mar Foods*, 994 F. Supp. 1061 (N.D. Iowa 1998), this court summarized the standards for an interlocutory appeal pursuant to § 1292(b), as articulated by the Eighth Circuit Court of Appeals in *White v. Nix*, 43 F.3d 374 (8th Cir. 1994):

> The court [in *White v. Nix*] held that "[t]he requirements of § 1292(b) are jurisdictional," and the statute should be used

[6]Because § 1292(b) provides for appeal of orders otherwise unappealable, and thus provides an avenue for resolving disputed and controlling questions of law, the resolution of which will materially further the litigation, the appellate court reviews *de novo* the questions of law certified by the district court. *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 400 (8th Cir.), *cert. denied*, 484 U.S. 917 (1987). The nature and scope of the appellate court's review is not rigidly determined by the certified questions, however. *Id.* (citing *In re Oil Spill by the Amoco Cadiz*, 659 F.2d 789, 793 n. 5 (7th Cir. 1981)). The appellate court

> remain[s] free to consider "'"such questions as are basic to and underlie"'" the questions certified by the district court. [*In re Oil Spill by the Amoco Cadiz*, 659 F.2d at 793 n. 5] (quoting *Helene Curtis Indus., Inc. v. Church & Dwight Co.*, 560 F.2d 1325, 1335 (7th Cir. 1977) (quoting 9 J. Moore, *Moore's Federal Practice* ¶ 110.25[1], at 270)); *Merican, Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958, 962 n. 7 (3d Cir. 1983), *cert. denied*, 465 U.S. 1024, 104 S. Ct. 1278, 79 L. Ed. 2d 682 (1984); *United States v. Connolly*, 716 F.2d 882, 885 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1065, 104 S. Ct. 1414, 79 L. Ed. 2d 740 (1984).

Simon, 816 F.2d at 400.

> with care to avoid piece-meal appeals. *White*, 43 F.3d at 376. Thus, the court stated that § 1292(b) "'should and will be used only in exceptional cases where a decision on appeal may avoid protracted and expensive litigation, as in antitrust and similar protracted cases.'" *Id.* (quoting S.Rep. No. 2434, 85th Cong., 2d Sess. (1958), reprinted in 1958 U.S.C.C.A.N. 5255, 5260). Thus, the statute should be used "sparingly" and the burden, on the movant, is a heavy one to show that the case is an "exceptional" one in which immediate appeal is warranted. *Id.* Nonetheless, the court's grant of interlocutory appeal is reviewed for abuse of discretion. *Id.* (finding abuse of discretion in that case in failure to consider whether the appeal involved a controlling question of law.). The court therefore reiterated that § 1292(b) establishes three criteria that must be met for certification by the court: "the district court must be 'of the opinion that' (1) the order 'involves a controlling question of law'; (2) 'there is substantial ground for difference of opinion'; and (3) certification will 'materially advance the ultimate termination of the litigation.'" *Id.* at 377.

Moland, 994 F. Supp. at 1077.

The court is of the opinion that this decision presents an "exceptional case" in which immediate interlocutory appeal should be permitted. *Id.* First, this ruling "involves a controlling question of law," or at the very least, a mixed question of law and fact, which is whether PIP properly effected service on Banss, by serving Schomber, pursuant to Rule 4(h)(1) of the Federal Rules of Civil Procedure, and more specifically, under either Iowa Rule of Civil Procedure 1.305(6), IOWA CODE § 617.3, or the "managing or general agent" alternative under Rule 4(h)(1). Second, notwithstanding this court's view concerning the appropriate outcome, "there is substantial ground for difference of opinion," *id.*, where there is a paucity of decisions interpreting the key provisions of the Iowa rule and statute or, for that matter, Eighth Circuit decisions interpreting the key provision of the federal rule. Finally, certification will "materially advance the ultimate termination of the litigation," because a ruling on the interlocutory appeal will either require the parties to proceed with this litigation, or if this court's determination that service was insufficient is in error, will lead to the immediate termination of the litigation and reinstatement of the default judgment.

This matter will, therefore, be certified for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) on the following question: Did PIP properly effect service on Banss, by serving Schomber, pursuant to Rule 4(h)(1) of the Federal Rules of Civil Procedure, and more specifically, under either Iowa Rule of Civil Procedure 1.305(6), IOWA CODE § 617.3, or the "managing or general agent" alternative under Rule 4(h)(1)?

III. CONCLUSION

Upon the foregoing,

1. Defendant Banss's June 26, 2007, Motion To Vacate Default Judgment Pursuant To Fed. R. Civ. P. 55(c) And 60(b)(4) (docket no. 33), as refiled under seal on June 27, 2007 (docket nos. 35 & 36), is **granted**, and the March 27, 2007, default judgment (docket no. 22) entered in this case against Banss is **hereby set aside**.

2. Plaintiff PIP shall have 120 days from the date of this order to attempt to effect proper service upon defendant Banss.

3. **This matter is certified for interlocutory appeal** pursuant to 28 U.S.C. § 1292(b) on the question stated above in section II.C.

IT IS SO ORDERED.

DATED this 14th day of September, 2007.

MARK W. BENNETT
U. S. DISTRICT COURT JUDGE
NORTHERN DISTRICT OF IOWA